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No. 96-663

In the
Supreme Court of the United States
October Term, 1996

MARVIN KLEHR and MARY KLEHR,
Petitioners,

v.

A.O. SMITH CORPORATION and
A.O. SMITH HARVESTORE PRODUCTS, INC.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

A. Background

The civil RICO statute, 18 U.S.C. § 1964, does not expressly provide a statute of limitations period or rule of accrual. Nearly 10 years ago, this Court determined the applicable limitations period, but expressly declined to decide when a civil RICO claim accrues, because that issue was not presented. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). The federal courts of appeals have wrestled with this issue, and have been unable to agree on the appropriate accrual rule.

The majority of the courts of appeals have held that a civil RICO claim accrues and the statute of limitations begins to run when a plaintiff discovers, or should have discovered, his injury. This rule has become known as the injury discovery rule. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *accord Grimmer v. Brown*, 75 F.3d 506, 511 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996), *cert. dismissed*, 117 S. Ct. 759 (1997); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-65 (7th Cir. 1992); *Rodriguez v. Banco Cert.*, 917 F.2d 664 (1st Cir. 1990) (Breyer, C.J.); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (assuming, without deciding, that injury discovery rule applies to civil RICO claims).

Some courts of appeals, however, have expressed concern that such a rule, applied literally, would have an unintended and unreasonably harsh effect under two sets of

circumstances, initially raised by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). The Third Circuit was concerned that, under an injury discovery rule, a plaintiff might be time-barred before the elements of his claim even existed if, for example, he was injured by a single predicate act and the defendant did not commit additional predicate acts forming a pattern until more than four years later. *Id.* at 1129. Second, the Third Circuit was concerned that in some cases, a plaintiff, although aware of his injury, might not be able to discover that the injury was part of a "pattern" of criminal activity until after the limitations period had run. *Id.* at 1130.

The Third Circuit's initial approach to accommodating plaintiffs under these circumstances was to adopt what has become known as the last predicate act or last injury rule. Under that rule, the limitations period remains open until four years after the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of criminal activity, regardless of whether that act resulted in injury to the plaintiff, or to anyone. *Id.* at 1126.

Following *Keystone*, other courts of appeals, including the Eighth Circuit, addressed the same concerns by applying a less open-ended rule. Under this rule, a civil RICO cause of action accrues when a plaintiff discovers, or reasonably should have discovered, the existence and source of his injury and that the injury is part of a pattern. See *Klehr v. A. O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996), *cert. granted*, 117 S. Ct. 725 (1997); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir.

1990), *cert. denied*, 500 U.S. 910 (1991).¹ This rule has become known as the injury and pattern discovery rule.

No other court of appeals has adopted the Third Circuit's last predicate act or last injury rule. That rule has been roundly criticized, and even the Third Circuit has signaled a retreat from that rule in subsequent decisions. See, e.g., *Davis v. Grusemeyer*, 996 F.2d 617, 625 n.16 (3d Cir. 1993) (providing an interpretation of the *Keystone* rule virtually indistinguishable from the injury and pattern discovery rule); *Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991) (narrowing the last injury prong to include only separate and independent injuries).

This case presents the Court with an opportunity to resolve the question reserved in *Malley-Duff* as to when a civil RICO action accrues, and to address the problems that have troubled the lower courts regarding the appropriate accrual rules. The Court should apply the traditional federal accrual rule to civil RICO claims. Under the traditional rule, a civil RICO cause of action would accrue when the elements of the claim exist and the plaintiff discovers or should have discovered his injury. As will be shown below, this traditional federal rule of accrual fully accounts for all of the concerns expressed by the different courts of appeals, is consistent with law in analogous areas, and most equitably embodies the twin principles of diligence and repose that underlie all statutes of limitation.

¹ Although the Sixth Circuit has affirmatively rejected the Third Circuit's last predicate act or last injury rule, it has yet to adopt a specific accrual rule. Instead, in two cases, it has found claims time-barred under either an injury discovery rule or an injury and pattern discovery rule. See *Caproni v. Prudential Securities Inc.*, 15 F.3d 614, 620 (6th Cir. 1994); *AgriStor Fin. Corp. v. VanSickle*, 967 F.2d 233, 241 (6th Cir. 1992).

B. Proceedings

Petitioners Marvin and Mary Klehr are dairy farmers who purchased a Harvestore silo in 1974, used the silo from July 1975 until May 1991, and filed this action on August 27, 1993, asserting various state law claims and a civil RICO claim under 18 U.S.C. §1964(c). Pet. App. B-1-2; J.A. 313, 318. Petitioners claimed they were induced to purchase the silo based on respondents' representations that the silo would prevent oxygen from contacting the feed stored within it, and would therefore eliminate spoiled or moldy feed, improve the health of their cows, increase their milk production by three to five pounds of milk per cow per day, drastically reduce or eliminate the need for costly protein supplements in the herd's daily rations, and increase their profitability so that the silo would pay for itself in four to five years. Pet. App. B-2-3. Petitioners claimed to have received through the mail at least 20 brochures, magazines or other advertisements making some or all of these representations before purchasing the Harvestore, and to have known that respondents had made these representations to other farmers. Pet. App. B-17, G-1-12; J.A. 116, 123, 128-129.

Petitioners allege that *none* of these represented benefits of the Harvestore silo materialized. Instead, petitioners allege, feed unloaded from the silo included chunks of mold and spoilage as early as 1976, and in every year thereafter; their cows experienced an *increase* in health problems, and new types of health and reproductive problems, soon after they began to feed from the silo, and each year thereafter; they were never able to reduce protein supplements; milk production did not increase; and profitability did not increase,

so the silo did not pay for itself in 4-5 years. Pet. App. B-3-8.²

Petitioner Marvin Klehr testified that he was an experienced dairy farmer in 1974, knew that exposure of feed to oxygen caused mold and spoilage, and knew that mold and spoilage was harmful to cows. Pet. App. B-12.

The U.S. District Court for the District of Minnesota did not reach the merits of petitioners' allegations because it

² In addition to the allegations submitted to the courts below, petitioners' brief includes certain assertions made for the first time before this Court. Two bear further discussion. Petitioners claim that Harvestore silos *never* work and that there is no research supporting their effectiveness as a method of storing animal feed, e.g. Pet Br. at 3, 5 (Harvestores, as a matter of science "don't work"), 4 (respondents "knew . . . that no science stood behind its claims"). There was *no* evidence in the record below to support these assertions, and they are not true. Approximately 83,000 Harvestore silos have been sold since 1949; in contrast, fewer than 270 legal claims have been brought challenging their effectiveness for storing feed. Furthermore, Harvestore silos have been owned, operated and tested by various governmental agencies and scores of colleges and universities nationwide for the past 45 years. Independent experts from the United States Department of Agriculture, the Ministry of Agriculture for the Province of Ontario, the University of Wisconsin, the University of Illinois, the University of Minnesota, Iowa State University, and other land-grant universities have conducted dozens of scientific experiments and feeding trials, which conclude that Harvestore silos safely and effectively store feeds and support excellent livestock production. See, e.g., L. Kung, et al., Abstract, *Extent of Heat Damaged Protein and Nitrogen Degradability in Alfalfa Haylage as Related to Silo Structure, Protein and Dry Matter Content*, 55 J. Animal Sci. 315 (1982 Supp. 1); M.P. Hoffman and H.L. Self, *Comparison of Artificially Dried Corn with High-Moisture Corn Stored in Two Silo Types*, 41 J. Animal Sci. 500, 506 (1975); J.H. Clark, et al., *Feeding Value of Dry Corn, Ensiled High Moisture Corn, and Propionic Acid Treated High Moisture Corn Fed with Hay or Haylage for Lactating Dairy Cows*, 56 J. Dairy Sci. 1531, 1537 (1973); H.J. Larson, et al., *A Comparison of Haylage and Wilted Grass Silage Plus Hay in the Dairy Cow Diet* (August 1971) (Research Report No. 78 -- Univ. of Wisc. & U.S. Dept. of Agric.); J.D. McCaffree and W.G. Merrill, *High Moisture Corn for Dairy Cows in Early Lactation*, 31 J. Dairy Sci. 553, 558-60 (1968).

granted summary judgment for respondents on the ground that the action was time-barred, applying to their civil RICO claim a four-year limitations period and the Eighth Circuit's injury and pattern discovery accrual rule. Pet. App. B-16-17, B-19. Taking petitioners' allegations and testimony as true, the court found that the only reasonable inference that could be drawn from the evidence was that the Klehrs "should have known shortly after using the Harvestore silo that they were not receiving the represented benefits which induced them to purchase the silo." Pet. App. B-11-12, B-17. Further, petitioners should have discovered that the alleged injury was part of a pattern at the same time. Pet. App. B-17.

The court also held that the separate accrual rule and the fraudulent concealment doctrine did not apply to the facts of this case. Pet. App. B-18, B-19 n.6, B-15. A new cause of action did not accrue within the limitations period based on allegations that petitioners continued to suffer damages, because those damages were merely a continuation of damages arising from petitioners' initial injury when they purchased and began using the silo in the 1970s. Pet. App. B-18.

The fraudulent concealment doctrine did not apply because the alleged acts of concealment -- pre-sale and identical post-sale advertising misrepresenting the characteristics of the silo, and concealment of knowledge that the silo was defective -- did not prevent petitioners' discovery of the facts establishing their cause of action: that the Harvestore did not perform as represented. Pet. App. B-19 n.6, B-15-16. The court found that the facts establishing petitioners' cause of action were not susceptible to concealment because evidence of the moldy and spoiled feed coming from the silo, the unhealthy cows, and the lack of protein savings were on petitioners' own farm, and because Dairy Herd Improvement Association ("DHIA") reports

showing milk production rates and profitability had been sent to petitioners monthly during the entire period they operated the farm. Pet. App. B-15, B-19 n.6. The court further rejected the argument that comments by Harvestore representatives constituted fraudulent concealment because Marvin Klehr himself had testified that these representatives had never attributed the mold, herd health problems, or low milk production to the Klehrs' mismanagement. Pet. App. B-16.

The U.S. Court of Appeals for the Eighth Circuit, reviewing *de novo*, affirmed, finding that petitioners should have discovered the facts constituting the existence, source, and pattern of the injury, and establishing all elements of their civil RICO claim, long before 1987. Pet. App. A-6-7, A-10, A-12, A-15. Under that circuit's civil RICO accrual rule -- the injury and pattern discovery rule -- the claim was found to be time-barred. Pet. App. A-14, A-16. The court expressly considered, and rejected, adoption of the last predicate act rule adopted in *Keystone*, or any variation of that rule, because "such an 'open-ended' standard... was inconsistent with 'the underlying policy of a statute of limitations requiring due diligence on the part of the plaintiff.'" Pet. App. A-16 (quoting *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991)).

The Eighth Circuit also affirmed the district court's finding that the fraudulent concealment doctrine did not apply to toll the limitations period because respondents "did not, and indeed could not, prevent [petitioners] from discovering that [respondents'] promises concerning the virtues of a Harvestore unit did not come to pass." Pet. App. A-13. Finally, the Eighth Circuit affirmed the district court's ruling that any damages suffered during the four years prior to filing did not give rise to a separate cause of action because those damages flowed from the original injury sustained in the

1970s, the silo's failure to operate as represented. Pet App. A-16-17.

SUMMARY OF ARGUMENT

Instead of creating a special accrual rule for civil RICO claims, the Court should apply to those claims the *same* rule that has traditionally been applied to most federal civil claims. Under that rule, the limitations period for civil RICO claims begins to run when (1) all elements of the civil RICO claim exist, and (2) the plaintiff discovers, or reasonably should have discovered, his injury. Different acts resulting in different injuries to the same plaintiff establish separate causes of action, which accrue separately. Traditional equitable tolling applies to provide additional time to a reasonably diligent plaintiff who is unable to discover the acts or events establishing a civil RICO claim during the limitations period. Pt. I.A.1.

1. This rule resolves the concerns that have divided lower courts. First, a civil RICO action cannot become time-barred before it even exists, because the rule makes clear that the limitations period does not begin to run until all elements of the claim exist. Second, the rule addresses the difficulty under some circumstances of discovering the predicate acts necessary to plead a RICO pattern by providing equitable tolling for diligent plaintiffs for a reasonable period of time. Pt. I.A.2.

2. This rule also better serves the purposes underlying statutes of limitation than the minority rules adopted by some courts of appeals – the last predicate act rule and the injury and pattern discovery rule. It places greater pressure on potential plaintiffs to bring claims while the evidence remains reliable, and provides greater certainty in the conduct of

commercial affairs. Pt. I.B. At the same time, the rule is consistent with the civil RICO statute, which provides a remedy to private plaintiffs only if they suffer “injury,” because it is triggered by that injury rather than by the last predicate act, which may not have injured the plaintiff, or anyone. Pt. I.C.

3. Because the court below found petitioners’ claim time-barred under a rule permitting a civil RICO claim to accrue *later* than the date of accrual under the rule proposed here, petitioners’ claim is necessarily time-barred under the proposed rule. Pt. I.D.

4. As both courts below ruled, the doctrine of fraudulent concealment is not applicable to this case. That doctrine applies only when a defendant’s conduct prevents discovery of facts needed to plead a cause of action. Both courts below held that respondents did not prevent petitioners from discovering the facts establishing a civil RICO cause of action. Pt. II.

ARGUMENT

I. THE COURT SHOULD APPLY TO CIVIL RICO CLAIMS THE SAME ACCRUAL RULE THAT COURTS HAVE TRADITIONALLY APPLIED TO OTHER FEDERAL CIVIL CLAIMS.

A. All of the Concerns Troubling the Courts of Appeals Would Be Fully Addressed by Applying the Traditional Federal Accrual Rule to Civil RICO.

There is no need to cobble together a special accrual rule for civil RICO. The accrual rule traditionally applied to federal

civil claims is also an appropriate rule for civil RICO actions. Under this rule, the limitations period begins to run when (1) all of the elements of a civil RICO claim exist, and (2) the plaintiff discovers, or reasonably should have discovered, his injury. If, at a later date, the plaintiff suffers a different injury by reason of the same pattern of racketeering activity, a separate cause of action accrues when the plaintiff discovers, or should have discovered, that injury. In addition, as is true with respect to other federal civil claims, this rule is subject to equitable tolling in cases where a plaintiff, exercising reasonable diligence, is unable to discover the acts or events that form the basis of a civil RICO claim within the four-year limitations period. In such a case, the limitations period is tolled for the period of time needed by a reasonable person, exercising reasonable diligence, to discover these acts or events and file a claim. The civil RICO accrual rule adopted by a majority of the courts of appeals expressly includes some or all of these elements.

1. This Rule is Consistent With Accrual Rules Applicable to Other Federal and State Actions.

The rule of accrual proposed by respondents for civil RICO actions is the rule most frequently applied to other federal claims. The requirement that all elements of the civil RICO claim must exist before the limitations period begins to run is congruous with the accrual rule applicable to every other type of claim, state and federal. It is long-settled law that statutes of limitation do not begin to run before there is "a complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). "[A] right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954); see also *United States v. Cocoa Berkau Inc.*, 990 F.2d

610, 613 (Fed. Cir. 1993) ("[t]he law is well settled . . . that a claim does not accrue until all events necessary to fix the liability of a defendant have occurred"). Indeed, the background rule in common and statutory law is that the limitations periods begin to run as soon as "the right of action is complete" and the plaintiff has the right to institute a suit. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875). Accrual rules establishing a different point from which the limitations period begins to run are exceptions. *Id.*

The requirement that the plaintiff must be on notice of his injury before the limitations period begins to run, although an exception to the background rule, is an exception which has generally been adopted with respect to federal claims. See, e.g., *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986) (claim under Quiet Title Act); *United States v. Kubrick*, 444 U.S. 111, 120-22 & n.7 (1979) (claim under Federal Tort Claims Act); *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (claim under Federal Employer's Liability Act); *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918) (bankruptcy fraud claim).³ Notice of injury is sufficient to prompt a reasonably diligent plaintiff to investigate and discover the

³ Lower courts and commentators have long recognized the prevalence of a discovery of injury exception for federal claims. See, e.g., *Sprint Communications Co. v. Federal Communications Comm'n*, 76 F.3d 1221, 1226 (D.C. Cir. 1996) ("[i]n federal courts 'the general rule of accrual' . . . is that . . . the limitations period begins to run only when 'the plaintiff discovers, or with due diligence should have discovered, the injury that is the basis of the action'" (quoting *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341-42 (D.C. Cir. 1991)); *Golden Gate Hotel Ass'n v. San Francisco*, 18 F.3d 1482, 1485 (9th Cir. 1994) (under federal law, the limitations period accrues when a party knows or has reason to know of the injury which is the basis of the cause of action); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399, 1406 (1990) (noting "the near universal application of the discovery rule of accrual to any Federal cause of action").

remaining elements of the claim. The limitations period provides the time period within which the person who is on notice of injury "may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable." *Central States Pension Fund v. Navco*, 3 F.3d 167, 171-72 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).⁴

Similarly, the rule of separate accrual for each additional act by a defendant that injures the plaintiff is simply the traditional federal accrual rule. *See State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (noting that the separate accrual rule has long been applied in antitrust and § 1983 actions). The separate accrual rule distinguishes between a separate and independent injury caused by an act committed within the limitations period (which may be separately actionable) and continuing damages flowing from an injury sustained as a result of an act committed outside the limitations period (which are not). *Id.*⁵ It is therefore not surprising that every

⁴ At least two courts of appeals have expressly recognized both requirements in the civil RICO context. *See Grimmer v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996) (civil RICO action accrues when all the elements of a RICO claim exist and plaintiff knows or should have known of the injury which is the basis of the action); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992) (civil RICO claim accrues once there is a RICO violation and the plaintiffs knew or should have known they were injured). Every court of appeals has found application of a discovery exception appropriate to civil RICO claims; seven courts of appeals define discovery of injury as the discovery necessary.

⁵ *See also DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (for a separate cause of action to accrue, there must be a new overt act, characterized as "a new and independent act that is not merely a reaffirmation of a previous act" and that "inflict[s] new and accumulating injury on the plaintiff") (quoting *Pace Indust., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)); *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (overt act by defendant required to restart statute of limitations; focus is on timing of the cause of injury, not the effects of the overt acts); *KAW Valley Elec. Cooperative Co. v.*

court of appeals that has considered the question has confirmed the applicability of the traditional separate accrual rule in the civil RICO context.⁶

Petitioners' reliance on the Clayton Act to suggest a different rule is misplaced. Clayton Act civil actions are governed by the same separate accrual rule as is proposed here. Each act in violation of the Clayton Act that causes a distinct injury to someone constitutes a separate civil cause of action, with a separate accrual period. The continuing

Kansas Elec. Power Cooperative, Inc., 872 F.2d 931, 933 (10th Cir. 1989) (new cause of action accrues "only if acts committed within the limitations period are somehow more than 'the abatable but unabated inertial consequences of some pre-limitations action'" (quoting *Poster Exchange, Inc. v. National Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982) (continuation of damages within the limitations period resulting from injurious acts outside the limitations period does not give rise to a new cause of action), *cert. denied*, 459 U.S. 1105 (1983).

⁶ *See Grimmer*, 75 F.3d at 513 (holding that there must be a new and independent act, not merely a reaffirmation of a previous act, that must inflict a different injury on the plaintiff); *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1418, *reh'g denied*, 116 S. Ct. 1870 (1996) (confining the separate accrual rule to new and independent injuries); *Cherry v. Diaz*, 991 F.2d 787, RICO Bus. Disp. Guide 8273, 1993 WL 118099, at *3 n.3 (4th Cir. April 16, 1993) (no separate accrual where plaintiffs had suffered no new injuries which were independent of the original injury) *cert. denied*, 510 U.S. 863 (1993); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465-66 & n.10 (7th Cir. 1992) (explaining that "[u]nder a separate accrual rule, a new cause of action accrues only when there is a new instance of wrongful conduct and a new injury"); *Glessner v. Kenny*, 952 F.2d 702, 707-08 (3d Cir. 1991) ("further injuries" sufficient to revive the limitations period must be "new and independent" and explaining that "the mere continuation of damages into a later period will not serve to extend the statute of limitations"); *Bath v. Bushkin, Gains, Gaines and Jonas*, 913 F.2d 817, 820 (10th Cir. 1990) (*per curiam*) (same); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1554-55 (11th Cir. 1990) (same); *Klehr*, 87 F.3d at 239 (same).

violation doctrine applied in Clayton Act jurisprudence simply recognizes that each day a group of conspirators refuse to deal, or a monopolist controls the market, they commit new acts in restraint of trade that inflict new injuries on other market participants. See, e.g., *Zenith Radio Corp. v. Hazeltine Corp.*, 401 U.S. 321, 338-39 (1971). Thus, under the separate accrual rule, each such act provides those who are injured with a new cause of action which is subject to the applicable four-year limitations period. In contrast, a fraudulent sale of one defective product, as is alleged here, occurs once — at the time of the sale.⁷

Finally, the equitable tolling doctrine proposed by respondents is also an established element of most federal accrual rules. See, e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (time requirements for federal claims are “customarily subject to ‘equitable tolling’” (quoting *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95 (1990))); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (finding Title VII suits subject to equitable tolling); *Bowen v. City of New York*, 476 U.S. 467, 481 (1986) (finding equitable tolling applicable to disability benefit claims); *Honda v. Clark*, 386 U.S. 484, 494 (1967) (finding equitable tolling applicable to Trading With The Enemy Act claims). Under this doctrine the limitations period may be extended for plaintiffs who have notice of injury but, despite acting with reasonable diligence, are unable to discover vital information bearing on the acts or events that constitute the elements of their claims. See *Lampf*, 501 U.S. at

⁷ Petitioners’ reliance on the Clayton Act is thus misplaced not because the Clayton Act’s accrual rule is inapplicable to civil RICO actions, but because application of that rule cannot bring their 1993 claims over a fraud allegedly committed in 1974 within the applicable limitations period.

363; *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). Such plaintiffs are traditionally allowed sufficient time to enable a reasonably diligent plaintiff to discover these acts or events and initiate a lawsuit. See *Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).⁸

Furthermore, the traditional federal accrual rule proposed here is consistent with the accrual rules generally applied to the state law claims based on the same conduct as the civil RICO action. Most states, for example, have adopted an accrual rule for fraud claims in which the limitations period begins to run when the plaintiff knows or reasonably should know that he has been injured, assuming the other elements of the claim are also discoverable.⁹ Most states apply a similar accrual rule to products liability claims.¹⁰ Many states also

⁸ At least three courts of appeals have suggested that traditional equitable tolling rules are appropriate in civil RICO actions. See, e.g., *McCool*, 972 F.2d at 1465; *Rodriguez* 917 F.2d at 668; *Bankers Trust*, 859 F.2d at 1105.

⁹ See, e.g., *Miller v. Lambert*, 467 S.E.2d 165, 171 (W.Va. 1995) (“[w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury”); *Rumford v. Valley Pest Control, Inc.*, 629 So. 2d 623, 627 (Ala. 1993) (the fraud action “did not accrue until [plaintiffs] discovered the [termite] damage to their house”); *Moorman Mfg. Co. v. National Tank Co.*, 414 N.E.2d 1302, 1314 (Ill. Ct. App. 1980) (“[t]he law is clear in Illinois that a cause of action for misrepresentation does not accrue until the injury is discovered”), *aff’d in part*, 435 N.E.2d 443 (Ill. 1982) (fraud claim dismissed on other grounds).

¹⁰ See, e.g., *Martinez v. Humble Sand & Gravel, Inc.*, 1996 WL 674431, at *2 (Tex. Ct. App. 1996) (“the limitation period of a tort claim . . . does not begin to run until the injury done to the plaintiff is discovered, or until the plaintiff acquires knowledge of facts which, in the exercise of reasonable diligence, would lead to the discovery of injury”) (slip op.); *Kansas City v. W.R. Grace & Co.*, 778 S.W.2d 264, 268 (Mo. Ct. App. 1989) (“[a] cause of action for negligence or strict liability accrues not ‘when the wrong is done or the technical breach of contract or

apply an equitable tolling doctrine that focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant.¹¹

2. *The Traditional Federal Accrual Rule Solves the Potential Problems that Have Troubled the Courts Below.*

The concerns expressed by a number of courts of appeals are fully and fairly answered by applying the traditional federal rule of accrual to civil RICO claims. One of the potential situations that concerned those courts -- that a plaintiff's right of action might become time-barred before it even exists -- cannot occur under the rule proposed here. This is because the clock on a civil RICO claim, as on other federal claims, does not begin to tick until all elements of the claim exist, including the pattern elements.

The other potential situation of concern -- that a plaintiff's right of action might become time-barred despite the plaintiff's diligence in attempting to determine the cause of his injury and who was responsible -- is accounted for by application of the traditional equitable tolling doctrine. Indeed, equitable tolling was fashioned, and has long been relied on, to provide a solution for *precisely* this situation. *Lampf*, 501 U.S. at 363. Thus, a plaintiff who diligently investigates but is unable to discover the acts or events on which his claim is

duty occurs, but when the damage resulting therefrom is sustained and capable of ascertainment.") (quoting MO. REV. STAT. § 516.100).

¹¹ See, e.g., *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994) ("equitable tolling turns on fact-specific questions as to whether a plaintiff in her situation reasonably should have discovered that she had been injured"); *Ramsey v. Culpepper*, 738 F.2d 1092, 1096 (10th Cir. 1984) (in New Mexico, cause of action based upon fraud and negligence is subject to equitable tolling).

based during the limitations period will not be barred. Instead, the limitations period will be tolled for as long as would be needed for a reasonably diligent plaintiff to discover these facts and file a claim. Equitable tolling thus directs relief at the plaintiff's specific difficulty and fully alleviates it. If the elements of a civil RICO claim prove more difficult to discover than the elements of other federal claims, courts will apply equitable tolling more often than in other types of cases. A unique solution specifically formulated to help civil RICO plaintiffs is not required.

B. *The Traditional Federal Accrual Rule Furthers the Purposes Underlying Statutes of Limitation.*

The application of the traditional federal accrual rule to civil RICO claims properly enforces the right of action Congress created, while also furthering the important "public interest" served by statutes of limitation. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938). As this Court has many times recognized, statutes of limitation are important elements in our system of justice, and are "vital to the welfare of society and are favored in the law." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). "They represent a public policy about the privilege to litigate." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). Limitations periods "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). Equally important, limitations periods represent a consensus that certainty and finality in the administration of society's

affairs, especially in commerce, require contingent liabilities to terminate at a reasonably predictable point in time. *See, e.g., Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975). Finally, limitations periods serve to discourage fictitious claims. *See Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868) ("claims which are valid are not usually allowed to remain neglected").

Application of the traditional federal accrual rule to civil RICO actions serves all of the salutary purposes of statutes of limitation. By imposing on an injured plaintiff an obligation to act with reasonable diligence, it encourages civil RICO plaintiffs to pursue their claims promptly. It furthers the interests of the courts and public confidence in our judicial system by relieving courts and juries of the burden of trying questions that are remote in time with the attendant loss of evidence from the death or disappearance of witnesses, destruction of documents or failure of memory. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965); *Missouri, Kan. & Tex. R.R. Co. v. Harriman*, 227 U.S. 657, 672 (1913). The rule also affords a needed measure of stability and security to the business world because it terminates most potential claims four years after the injury reasonably should have been discovered. And it achieves all of these societal interests, not by unfairly punishing innocent plaintiffs, but simply by requiring plaintiffs to act with reasonable diligence once they know, or should know, they have been injured.

Furthermore, application of the traditional federal accrual rule to civil RICO claims permits the courts to be guided by the substantial body of existing law governing the application of this rule in other areas. Apart from utilizing well established common law principles, the traditional rule effectively balances the need to assure that *diligent* plaintiffs

have their day in court, against the legitimate purposes of stability and repose underlying statutes of limitation.

In marked contrast, petitioners' proposed rule is virtually open-ended. A civil RICO claim based on the purchase of a product, for example, could be brought for as long as that product was offered for sale — 10, 20, even 50 years after the purchase. Indeed, placing a lengthy tail on civil RICO claims is precisely petitioners' goal because petitioners themselves waited until 1993 to bring a claim on a 1974 purchase — almost 20 years.

Moreover, under the rule urged by petitioners, they would still not have been time-barred had they waited another 20 years to bring their claim — 43 years after purchasing the silo — so long as respondents continued to sell and advertise the product. For this reason, among others, the Third Circuit's last predicate act rule has been roundly criticized by other courts of appeals. *See, e.g., Rodriguez*, 917 F.2d at 667 (last predicate act rule would allow a "fully knowledgeable plaintiff" at least three or four decades to bring suit if the pattern continues); *Granite Falls Bank*, 924 F.2d at 154 (last predicate act rule inconsistent with underlying policy of statutes of limitation requiring plaintiff to exercise diligence). There is no reason why a plaintiff armed with full knowledge of the injury done to him, and the means to protect himself by seeking legal advice and bringing a cause of action, should be provided an indefinite period of time to bring suit.

Finally, petitioners "retreat[] to that last redoubt of losing causes, the proposition that the statute at hand should be literally construed to achieve its purposes." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 115 S. Ct. 1278, 1288 (1995) (citation omitted). In other words, petitioners ask this Court to ignore the important public policies furthered by statutes

of limitation, because it is clear that their proposed rule is irreconcilable with these policies.

Petitioners' plea for liberal construction of the statute is unavailing. First, there is no statutory provision relating to accrual to liberally construe. Second, application of traditional statutes of limitation is not inconsistent with a proper interpretation of the civil RICO statute, as this Court clearly determined in *Malley-Duff*. All limitations periods and accrual rules cut off some valid claims, but that alone is plainly not inconsistent with the statute. For example, in *Malley-Duff*, this Court found it appropriate to impose a four-year limitations period on civil RICO claims. Indeed, this Court expressly rejected the alternative that no statute of limitations should apply to civil RICO on the ground that "a federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.'" *Malley-Duff*, 483 U.S. at 156 (quoting *Wilson v. Garcia*, 471 U.S. 262, 271 (1985)).

Petitioners' proposed rule does nothing "to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983) (citations omitted). It permits plaintiffs with full knowledge of the wrong committed against them to be flagrantly dilatory. Such a rule offends the purposes of RICO and the policies of diligence and repose embodied in federal civil statutes of limitation, and should be rejected.

The injury and pattern discovery rule, applied by the Eighth Circuit below, is certainly less open-ended than the rule urged by petitioners, but that rule also is more open-ended than is either necessary or appropriate. The key difference between the traditional federal accrual rule and the injury and pattern discovery rule is the length of time available to a diligent plaintiff *once he has discovered the facts*

supporting his claim. Under both rules, a plaintiff who is on notice of injury but has neither actual nor constructive knowledge of the other elements of a RICO claim, despite the exercise of reasonable diligence, is provided additional time to acquire that knowledge and bring a claim. Under the traditional federal accrual rule, such a plaintiff is provided the amount of time that is reasonably necessary to acquire the knowledge and bring the claim. Under the injury and pattern discovery rule, however, after such a plaintiff is reasonably able to discover the facts supporting his claim, he would nonetheless be given an additional four years to bring a claim. This is because, under the injury and pattern discovery rule, the limitations period only *begins* to run when the plaintiff knew, or should have known, of the RICO pattern as well as his own injury.¹²

No legitimate purpose is served by creating an exception to the traditional federal accrual rule to afford a plaintiff who knows he is injured and knows that the injury was part of a pattern of criminal activity more than the time necessary to seek legal advice and file a claim. In its application, the injury and pattern discovery rule requires plaintiffs to be diligent up until the time they learn all they need to learn to file suit, but then inexplicably removes the pressure entirely for an additional four years. Because no purpose is served by

¹² For example, under the injury and pattern discovery rule, if a plaintiff knows he is injured in year 1, but cannot reasonably discover the pattern until February of year 5, the four-year limitations period begins to run in February of year 5. In contrast, under the traditional federal accrual rule, the four-year limitations period would begin to run in year 1, but the plaintiff would be afforded a reasonable period after February of year 5 to seek legal help and file a claim. Thus, under the injury and pattern discovery rule, the plaintiff would be able to bring suit until February of year 9. Under the traditional federal accrual rule, the plaintiff would have to bring suit in year 5.

permitting plaintiffs four years longer than they need to learn the facts supporting their claim and press that claim in court, and because the additional four years imposes unnecessary costs on the judicial system and on commercial activity, it is a less appropriate choice.

C. The Traditional Federal Accrual Rule Is Consistent with and Furthers the Purposes of the Civil RICO Statute.

Application of the traditional federal accrual rule is consistent with the right of action Congress fashioned. It recognizes that, although Congress made a continuing criminal enterprise an element of a civil RICO claim, Congress premised the civil remedy on specific *injuries*. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495-96 (1985). The traditional federal accrual rule ensures that injured plaintiffs have an opportunity to investigate and bring civil RICO claims to recover damages caused by RICO violations, because the limitations period does not begin to run until the elements of the claim exist and the plaintiff is on notice that he has been injured, and because the limitations period may be extended when reasonably diligent investigation cannot uncover the facts needed to bring a claim within the four-year period.

At the same time, the rule encourages those plaintiffs, who are in a position to do so, to bring pressure to bear on criminal enterprises to end their criminal activity as soon as

possible by bringing claims for treble damages.¹³ This serves the statutory purposes by exposing and deterring RICO violations before *other* parties are injured. Congress provided powerful incentives for plaintiffs to pursue RICO claims in order to encourage them to act, not merely as private individuals, but as private attorneys general. See, *Malley-Duff*, 483 U.S. at 151; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987); *Sedima*, 473 U.S. at 494. Congress' goal of deterring RICO violations by encouraging this private enforcement mechanism is undermined if private plaintiffs are allowed to be needlessly dilatory in the pursuit of their claims.

Petitioners' argument for application of the criminal RICO accrual rule to private rights of action, Pet. Br. at 26, finds no support in the provisions or structure of the statute, and would disserve its purposes. The criminal RICO accrual rule — which starts the limitations period when the last predicate act in the pattern is committed — is fashioned to serve the terms and purposes of the *criminal* RICO statute. A *criminal* violation of RICO occurs when a person invests in, controls or participates in an enterprise through a pattern of racketeering activity. See 18 U.S.C. § 1962(a)-(c). It is the *pattern* of racketeering activity *alone* that gives rise to criminal liability under RICO, without regard to injury. For these reasons, the courts that have addressed the issue have found that the limitations period for *criminal* RICO runs from the last predicate act. See *United States v. Torres Lopez*, 851

¹³ The separate accrual rule, in which each distinct and independent injury is a separate cause of action, recognizes that a RICO pattern of criminal activity may impose multiple and independent injuries on an individual plaintiff and that these may occur over a period of time, and it provides a mechanism by which that plaintiff may recover treble damages for each such injury. See, e.g., *Bankers Trust*, 859 F.2d at 1103.

F.2d 520, 525 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988).

By contrast, these same criminal RICO violations do not give rise to a *private* RICO claim unless and until they cause *injury*. A plaintiff has no private right of action under RICO, and may not seek any damages, unless he is "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Thus, a civil RICO cause of action cannot accrue absent such injury. *Sedima*, 473 U.S. at 495-97. A pattern of racketeering activity alone does not give rise to liability to a private plaintiff. *Id.*

In light of RICO's clear statutory scheme establishing different elements for civil causes of action than for criminal violations, the rule of accrual appropriate to criminal actions is patently inappropriate to civil suits. Rather, the statutory provisions support different accrual rules -- an accrual rule tied to the pattern of activity for criminal RICO prosecutions and an accrual rule tied to the occurrence, and the plaintiff's discovery, of injury for civil RICO lawsuits. As this Court recognized in *Malley-Duff*, statute of limitations rules appropriate to criminal RICO do "not reflect any congressional balancing of the competing equities unique to civil RICO actions or, indeed, any other federal civil remedy." 483 U.S. at 156 (imposing a four-year limitations period for civil RICO actions rather than the five-year period applicable to criminal RICO). Thus, this Court has already noted that the differences between civil RICO and criminal RICO require different *periods* of limitation; those same differences also require different accrual rules.

The last predicate act rule may be appropriate for criminal RICO, which imposes liability solely for the pattern of predicate acts, but it is ill-suited to civil RICO. The civil

RICO provision focuses on the specific injury to the plaintiff's business or property as part of a pattern of criminal activity. Later predicate acts by the same defendant which harm someone else altogether, or harm no one at all, are unrelated to that plaintiff's injury or claim for redress. Reviving the limitations period for each later predicate act is therefore antithetical to the statute's specific purpose of encouraging private parties to actively investigate and punish patterns of criminal activity as private attorneys general. The last predicate act rule urged by petitioners -- rather than encouraging plaintiffs to expose and stop ongoing criminal enterprises -- allows plaintiffs to rest on their claims until four years after the criminal activity has been voluntarily terminated by its perpetrators. Such a rule would be considerably less effective than the traditional federal civil accrual rule in curbing the "serious national problem" that prompted Congress to enact RICO. *Malley-Duff*, 483 U.S. at 151. A rule that does not require a plaintiff to pursue or investigate a possible civil RICO claim once he knows or reasonably should know of his injury is simply inconsistent with Congress' intent to prevent further RICO violations by empowering victims of racketeering activity to bring civil enforcement proceedings as private attorneys general.¹⁴

¹⁴ In addition, the traditional federal accrual rule's requirement that the elements of the cause of action must exist before the limitations rule begins to run is more precisely suited to the civil RICO provision than the injury and pattern discovery rule's requirement that the plaintiff must have constructive knowledge of both injury and pattern before the limitations period begins to run. This is because the traditional federal accrual rule applies uniformly to every type of civil RICO action. The civil RICO provision permits a private action if the plaintiff suffered injury by reason of a violation of the criminal RICO provisions. Although the great majority of civil RICO actions are likely to allege a pattern of criminal activity as the requisite violation, pattern is not the only violation enumerated in the statute.

**D. Under the Traditional Federal Accrual Rule,
and Under the Rules Adopted in Eleven of
the Courts of Appeals, Petitioners' RICO
Claim Is Time-Barred.**

The Eighth Circuit and the district court below applied the injury and pattern discovery accrual rule adopted by at least three courts of appeals. That rule is more generous to plaintiffs than either the rule proposed here or any version of the injury discovery rule adopted by the majority of the courts of appeals. Nonetheless, the Eighth Circuit and the district court, applying that more generous rule to the allegations and evidence before them, properly found petitioners' claim to be time-barred. It follows *a fortiori* that petitioners are also time-barred under either of the stricter rules: the traditional federal accrual rule or the injury discovery rule.

The district court below held, as a finding of fact about which the evidence left no room for a reasonable difference of opinion, and on the basis of petitioners' own testimony, that petitioners "should have known shortly after using the Harvestore silo that they were not receiving the represented benefits which induced them to purchase the silo" and that the cause of the alleged deterioration in herd health and decrease in reproductive rates "should have been apparent to Klehr at the latest by the early 1980s." Pet. App. B-11-12.

The Eighth Circuit reviewed *de novo*, and viewing the evidence in the light most favorable to petitioners, concluded that petitioners were on notice of fraud "long before August 27, 1987," Pet. App. A-10, and "that the facts which should have put the Klehrs on notice of a possible cause of action for fraud should also have alerted them to the existence, source,

and pattern of the injury for their RICO claim." Pet. App. A-15. Further, the Eighth Circuit found, based on petitioners' own allegations and testimony, that they "knew or should have known shortly after purchasing the Harvestore that AOSHPI's representations concerning the silo's attributes were simply not coming true and thus should have recognized the existence and source of their injury." *Id.* Finally, based on petitioners' claim that they received numerous promotional materials before they even purchased the silo, the Eighth Circuit determined "they should have known that the misrepresentations were part of a pattern of suspected racketeering activity." *Id.*

Thus, for purposes of the civil RICO claim, both courts found that petitioners knew or should have known of the existence and source of their alleged injury, and that it was part of a pattern of racketeering activity, more than four years before they filed their lawsuit. Pet. App. B-18-19, A-17. Indeed, both courts expressly found that petitioners knew or should have known of both injury and pattern "long before" the four-year cut-off. Pet. App. B-19, A-17.

This case provides "no occasion to disturb the findings of fact by two courts." *Exploration Co. v. United States*, 247 U.S. 435, 445 (1918). All the facts relied on by these two courts were contained in the allegations and deposition testimony of petitioners themselves and fully support the courts' conclusions. Petitioner Marvin Klehr purchased the Harvestore in 1974, based on respondents' representations that oxygen would not contact the feed during storage, that he would therefore not have any moldy or spoiled feed, that his cows would be healthier and provide three to five pounds more milk per cow per day, that he could significantly reduce or eliminate protein supplements in their rations, and that the silo would pay for itself in four to five years. Pet. App. B-2-

3, A-3. He testified that he was an experienced dairy farmer before purchasing the Harvestore and knew that mold and spoilage in feed are caused by the feed's exposure to oxygen and that moldy and spoiled feed is harmful to dairy cows. Pet. App. B-3, A-2-3.

Petitioner Marvin Klehr further testified that he began using the Harvestore in mid-1975 and had noticed mold in the feed removed from the silo as soon as a year later, and then each year thereafter, and discarded loads of spoiled feed during each of these years. Pet. App. B-3-4, A-8. He also testified that shortly after he started feeding his cows from the silo their health deteriorated and they began experiencing theretofore unencountered reproductive problems. Pet. App. B-5-6, B-12, A-8. Petitioner's own testimony also established that he received monthly DHIA records which he claimed showed that neither his milk production nor his profits were increasing, and that he was not able to reduce the amount of protein added to the cows' feed. Pet. App. B-7-8, B-12, B-14, A-5, A-9. Moreover, petitioners claimed that they received 20 pieces of fraudulent advertising through the mail before they purchased the Harvestore, and relied on those advertisements to establish a pattern of predicate acts. Pet. App. B-17, A-15.

Under the traditional federal accrual rule, petitioners' limitations period began to run long before 1989 and their claim is therefore time-barred. All of the elements of their civil RICO claim were in existence by the time they should have discovered their injury. Petitioners knew or should have known that the representations made to them in advertising brochures and various farm magazines were regularly being made to others as early as 1974. And, as both courts below found, petitioners knew or should have known, assuming for these purposes that petitioners' claims are correct, that the representations made to them before they purchased the silo

were false and that their cows were experiencing health problems long before 1989.

Equitable tolling is not available to extend the limitations period here because, as both courts found, the facts supporting their claim were readily available to petitioners on their own farm and in their own DHIA records. Likewise, petitioners may not avail themselves of the separate accrual doctrine. The damages they allege occurred within the limitations period do not derive from a distinct and independent injury giving rise to a separate cause of action, but are rather only continued damages flowing from the initial injury in the 1970s. All of petitioners' damages are the natural and foreseeable consequence of a single injury allegedly caused by the failure of the Harvestore to provide oxygen-limiting storage. Accordingly, if this Court determines that the traditional federal accrual rule applies to civil RICO actions, it should affirm the decision of the court below.

Likewise, if this Court holds that the injury and pattern discovery rule applies to civil RICO actions, it should affirm the decision below, because the injury and pattern discovery rule was the rule applied below. Pet. App. A-14.

Finally, if this Court adopts a stricter construction of the injury discovery rule than is proposed here, it should affirm the decision below based on both the district court's and the Eighth Circuit's findings that petitioners should have discovered their injury and its cause before 1987. Indeed, both courts addressed this question expressly with respect to the state law fraud claim that was also before them. Under the Minnesota accrual rule for fraud, the limitations period begins to run when the plaintiff knew or should have known he was defrauded (*i.e.*, the injury). Pet. App. B-10, A-6-7. Thus, both courts considered when petitioners knew or should have known they were defrauded, and both courts concluded that

petitioners knew or should have known they were defrauded well before August 27, 1987 (the cut-off date for the state fraud claim). Pet. App. B-13, A-10. Furthermore, both courts expressly addressed when petitioners should have discovered their injury in determining whether the civil RICO cause of action was time-barred, and both found that petitioners had discovered or should have discovered their injury long before 1989. Pet. App. B-19, A-17.

Petitioners' claim survives *only* if accrual waits until the defendant commits the final predicate act in the alleged pattern of racketeering activity, and *only* if the plaintiff's knowledge of his injury and of the elements of his civil RICO claim are entirely disregarded. Thus, only if this Court adopts the last predicate act rule -- a rule respondents strongly urge should be rejected, for the reasons discussed above -- is it necessary to remand this case for further proceedings.

Notwithstanding petitioners' attempt to raise, at this late stage, questions about the burden of proof applicable to summary judgment determinations, and about the specific application of the summary judgment standard to the facts of this case, Pet. Br. at 34, these questions are not properly before the Court. These questions were not raised before the court below, or in petitioners' petition for rehearing. Furthermore, they were not included as questions presented in petitioners' petition for *certiorari* to this Court. Thus, under Sup. Ct. R. 14, it is unnecessary for the Court to consider them.

In any event, the lower courts properly placed the burden of proof for summary judgment on the moving party, and did not err in applying the summary judgment standard. Both courts placed the burden of establishing that there was no genuine issue of material fact on respondents. Pet. App. B-10, A-6. Both courts then properly required petitioners to

produce evidence in support of their allegations that the equitable tolling exception to the statute of limitations defense should apply.

In accordance with Rule 56, both courts correctly reviewed all of the facts in the light most favorable to petitioners. Indeed, as discussed above, both courts relied solely on facts asserted by petitioners in either their Amended Complaint or their sworn deposition testimony. Finally, both courts correctly drew inferences from petitioners' asserted facts only when the evidence left no room for reasonable minds to differ, permitting the courts to resolve the issues as a matter of law. Pet. App. B-10, A-6-7. Thus, there is no cause for this Court to review these determinations, even if the questions had been properly raised.¹⁵

II. BOTH LOWER COURTS CORRECTLY FOUND THAT THE DOCTRINE OF FRAUDULENT CONCEALMENT DOES NOT APPLY TO THE FACTS OF THIS CASE.

The doctrine of fraudulent concealment is not specific to civil RICO, and petitioners do not argue that the rules governing its application to civil RICO should be different from the rules governing its application in any other area of law. This case does not present any unresolved questions regarding the doctrine of fraudulent concealment. It is settled

¹⁵ In their Opposition to *Certiorari*, respondents raised a question with respect to the Court's jurisdiction. Because of the unusual procedural posture, in which this case was held for *Grimmett v. Brown*, Docket No. 95-1723, before being granted *certiorari*, respondents are not clear whether this Court has ruled on the jurisdictional question. If not, an alternative disposition available to the Court is to dismiss *certiorari* on the ground that the Petition for *Certiorari* was untimely under 28 U.S.C. § 2102(c). See Op. 4-8.

law, reflected in decisions of this Court and every circuit, that the doctrine of fraudulent concealment applies only where the defendant's conduct conceals or otherwise prevents discovery of the facts establishing the cause of action. The trial and appellate courts below applied settled law to the facts in this record and both courts concluded that respondents "did not conceal the facts constituting the cause of action" here. Pet. App. B-15, B-19 n.6, A-12-13. There is no need for this Court to review the application of that settled rule to the facts of this case.

A. There Were No Acts that Concealed, or Were Capable of Concealing, the Alleged Fraud.

It is long settled that the doctrine of fraudulent concealment applies only when facts needed to establish a cause of action are actually concealed from the plaintiff. *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349-50 (1875); *Wood v. Carpenter*, 101 U.S. 135, 143 (1879); *Davis v. Grusemeyer*, 996 F.2d 617, 624 (3d Cir. 1993); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Because that threshold showing was not made here, petitioners cannot rely on that doctrine.

In the courts below, petitioners essentially relied on two types of conduct to invoke the doctrine of fraudulent concealment -- pre-sale and post-sale advertisements allegedly misrepresenting the benefits provided by using Harvestore silos, and non-publication of respondents' internal research and development memoranda. Pet. App. B-15, A-12-13. In their brief to this Court, petitioners additionally rely on the largely sealed construction of the Harvestore itself. Pet Br. 6-

7. Because it was not raised in the district court, this fact-based argument is not properly before this Court. In any event, a comparison of the conduct relied upon with the facts needed to establish petitioners' civil RICO claim makes clear that none of this conduct concealed the facts establishing petitioners' claim.

Petitioners needed to establish the following: (1) respondents defrauded them by promising that the Harvestore would provide specific benefits -- namely that the Harvestore, by virtue of its oxygen-limiting abilities, would prevent mold and spoilage of feed, resulting in healthier cows, increased milk production, savings from reduction of protein supplements, and higher profitability sufficient to pay for the silo in 4-5 years; (2) these promises were misrepresentations and were never realized; and (3) the misrepresentations made to petitioners were also made to others, comprising a pattern of fraudulent activity.

The pre-sale advertisements, far from hiding these facts, are critical evidence establishing both the promises made to petitioners and respondents' open and widespread practice of making such promises to others. The post-sale advertisements which, according to petitioner Marvin Klehr, were simply reiterations of the representations in the pre-sale advertisements, J.A. 16-17, 132, 454, also constitute evidence that respondents were engaged in making these same promises to others, even after petitioners informed respondents of their difficulties with moldy feed and herd health.

Furthermore, neither the pre-sale nor the post-sale advertising concealed from petitioners the chunks of mold in the feed discharged from their Harvestore, or the musty smell and dark color of spoiled feed that petitioners regularly discarded. Neither the pre-sale nor the post-sale advertising concealed from petitioners the health problems or

reproductive abnormalities affecting their cows. Neither the pre-sale nor the post-sale advertising concealed from petitioners the amount of protein they added to the daily rations they fed their cows. Neither the pre-sale nor the post-sale advertising concealed from petitioners the amount of milk produced by their cows, or the amount of net income they derived from their dairy business. Pet. App. B-15, A-13. And, finally, neither the pre-sale nor the post-sale advertising concealed from petitioners the admission from respondents' representative that, despite the contrary promises made to the petitioners before they bought the Harvestore silo, they should expect to find mold in feed stored in a Harvestore silo. J.A. 276-77.

Petitioners' reliance on respondents' decision not to publish internal research and development memoranda is similarly unavailing. The decision not to publish did not conceal the factual bases of petitioners' claim — the promises made to petitioners, the contrary results petitioners experienced, or the pattern of promises made to other farmers. Pet. App. A-13.

The semi-sealed construction of the Harvestore also fails to establish fraudulent concealment. The construction of the Harvestore did not conceal respondents' promises to petitioners or other farmers, and did not conceal the visible mold or spoilage in the unloaded feed, the health problems of the cows, protein supplement levels, milk production levels, or net profits. Nor did the construction of the Harvestore prevent petitioners from having samples of the unloaded feed tested for heat damage and nutritional quality, consistent with standard dairy farming practice. J.A. 398-99, 444-45. Further, the construction of the Harvestore proved no impediment once petitioners decided to look inside. Petitioner Marvin Klehr testified that he, without help or special equipment,

was able to open the hatch, cut through the haylage with a chisel, and look at the feed inside the silo. J.A. 315-16.¹⁶

Moreover, none of the conduct relied upon was even capable of concealing from petitioners the readily observable facts they had at hand on their farm and in the monthly DHIA reports they received, which petitioners contend directly contradicted the representations on which they had relied in purchasing and using the Harvestore. Because petitioners had unfettered access to every fact needed to plead their civil RICO fraud claim, no act of which they complain can be considered an act of fraudulent concealment. Pet. App. B-15-16, A-13.

¹⁶ Petitioners also relied on a third type of conduct to invoke the doctrine of fraudulent concealment in the courts below that they do not appear to assert before this Court: that respondents' representatives offered farm management suggestions to petitioners. Petitioners no longer appear to maintain that respondents' representatives concealed the alleged fraud suffered by petitioners in this manner. Instead, petitioners' brief alleges more vaguely that respondents' representatives generally made management suggestions to farmers and that this concealed the alleged fraud from farmers generally. Pet. Br. 11. This point may have been included as evidence of a pattern; it is not, however, relevant to establishing fraudulent concealment in this case. In any event, as both courts below found, it is incontrovertible that respondents' representatives did not conceal from petitioners the failure of their Harvestore to fulfill respondents' promises. Petitioner Marvin Klehr testified under oath that none of respondents' representatives ever suggested that the mold, herd health problems or low milk production that he experienced on his farm were due to his mismanagement, rather than the Harvestore. Pet. App. B-16, A-13. Indeed, Marvin Klehr testified that he always understood he was operating the silo in accordance with proper management practices. J.A. 298-99; 303-05.

B. Petitioners' Failure to Exercise Reasonable Diligence Additionally Precludes Them from Invoking the Doctrine of Fraudulent Concealment.¹⁷

The doctrine of fraudulent concealment is available only to plaintiffs who have exercised reasonable diligence. *See, e.g., Bailey*, 88 U.S. at 349-50 (applying the doctrine only when there has been no negligence or laches on the part of the plaintiff in coming to the knowledge of the fraud); *Wood*, 101 U.S. at 140 (holding plaintiff to a stringent pleading requirement in fraudulent concealment case "so that the court [could] clearly see whether, by ordinary diligence, the discovery might not have been before made").

Only one circuit has dispensed with the diligence requirement. *See, e.g., Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975). In urging this Court to adopt the Seventh Circuit's rule, petitioners fail to acknowledge that every other circuit that has addressed the issue has held that the doctrine of fraudulent concealment is available only to reasonably diligent plaintiffs. *See, e.g., J. Geils Band Ben. Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1254 (1st Cir.) (the fraudulent concealment doctrine requires that there be a showing of reasonable diligence), *cert. denied*, 117 S. Ct. 81 (1996); *Grimmett*, 75 F.3d at 514 ("[T]he doctrine of fraudulent concealment is invoked only if the plaintiff both pleads and proves that the defendant actively misled her, and that she had neither actual nor constructive knowledge of the facts constituting her cause of action despite her due diligence");

¹⁷ Because petitioners did not make a threshold showing of concealment (*see* Point II.A. *supra*), it is not necessary for this Court to reach this point in order to affirm the lower courts' rejection of petitioners' fraudulent concealment claim.

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995) (to invoke the fraudulent concealment doctrine, a plaintiff must demonstrate that he failed to discover the concealed facts within the statutory period, despite the exercise of due diligence); *Davis*, 996 F.2d at 624 n.13 (to invoke the fraudulent concealment doctrine, plaintiff must show that his ignorance of the cause of action is not attributable to his lack of diligence); *Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (specifically rejecting a standard excusing diligence); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.) (same), *cert. denied*, 454 U.S. 895 (1981).¹⁸

The Eighth Circuit also follows the rule that the doctrine of fraudulent concealment is available only to diligent

¹⁸ Petitioners' reliance on the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), and the D.C. Circuit's decision in *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989), to suggest a more substantial split among the circuits is misplaced. *Riddell* makes clear that the D.C. Circuit rule is the normal rule: the doctrine of fraudulent concealment is available only to diligent plaintiffs. Indeed, *Riddell* expressly states that "if the jury finds fraudulent concealment, defendants will have the burden, if the statute is not to be tolled, of proving that plaintiff could have discovered the cause of action if he had exercised due diligence." *Id.* at 1491. (internal quotations omitted). Furthermore, although the Second Circuit in *Robertson* did follow the Seventh Circuit's rule, the Second Circuit's more recent opinions make clear it has abandoned that view, as the Seventh Circuit itself acknowledged in *Wolin v. Smith Barney Inc.*, 83 F.2d 847, 852 (7th Cir. 1996). *See, e.g., Stone v. Williams*, 970 F.2d 1043, 1048-49 (2d Cir. 1992) ("Fraudulent concealment does not lessen a plaintiff's duty of diligence; it merely measures what a reasonably diligent plaintiff would or could have known regarding the claims"); *see generally, Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 352 (2d Cir. 1993) (no tolling for fraudulent concealment where plaintiff has constructive notice of injury and would have, with diligence, discovered the facts supporting her claim); *Golden Budha Corp. v. Canadian Land Co. of America*, 931 F.2d 196, 201 (2d Cir. 1991) (in parallel state law claim, plaintiff's due diligence is "essential element for the applicability of the doctrine").

plaintiffs. Thus, the court below explained that petitioners' "lack of diligence precludes us from tolling the statute of limitations due to fraudulent concealment." Pet. App. A-14. In any event, application of even the Seventh Circuit's rule in *this* case would yield the same outcome. This is because even the Seventh Circuit's rule withholds the benefits of the doctrine of fraudulent concealment from plaintiffs who *have* discovered the facts establishing their claims. *See Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975) (where active concealment is found, "the statute is tolled until actual discovery"). Here, by their own admission, petitioners had actual knowledge in the 1970s that the feed they stored in the Harvestore was not free from mold and spoilage and was not sufficiently higher in protein that they could dispense with expensive protein supplements. J.A. 272-73, 279-81, 283-85, 308-11, 443-45. Further, they knew this was contrary to the representations that induced them to purchase the Harvestore, and that the representations made to them had been made, and continued to be made, to many other farmers. Petitioners therefore had actual knowledge of the facts constituting their civil RICO claim.

Thus, this case presents no opportunity for the Court to revisit the doctrine of fraudulent concealment. None of the conduct petitioners complain of actually concealed petitioners' cause of action from them, or was even capable of doing so. In addition, petitioners had actual knowledge of facts sufficient to establish their cause of action long before 1989, four years before they filed the claim. No rule proposed by petitioners would justify applying the doctrine of fraudulent concealment to this case.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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